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In the Supreme Court of the United States

OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

ANGELO J. SOLIMINO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

DONALD R. LIVINGSTON
Acting General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

LAMONT N. WHITE
Attorney

Equal Employment Opportunity Commission
Washington, D.C. 20507

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QUESTION PRESENTED

Whether, in a federal court action under the Age Discrimination in Employment Act, state agency findings of fact that have not been judicially reviewed have preclusive effect.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Astoria Federal Savings and Loan Association (Astoria) employed respondent Angelo J. Solimino from October 4, 1945, through March 5, 1982. On the latter date, Astoria terminated Solimino—then 63 years old—from his position as vice president of the Mortgage Origination Department. Pet. App. A3. On March 18, 1982, Solimino filed a charge of age discrimination with the Equal Em-

ployment Opportunity Commission (EEOC or Commission). *Ibid.* The EEOC referred his complaint to the New York State Department of Human Rights (DHR) pursuant to a worksharing agreement between the EEOC and DHR. *Ibid.*[1] On January 25, 1983, DHR dismissed the complaint, finding that the record before it contained no evidence that Solimino was terminated because of his age.[2] On May 30, 1984, the State Human Rights Appeal Board (Board) affirmed this ruling, concluding that DHR's dismissal of the complaint "was not arbitrary, capricious or characterized by an abuse of discretion." Pet. App. A45. Solimino did not seek judicial review of the Board's ruling. *Id.* at A4.[3]

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[1] Under the worksharing agreement then in effect, the EEOC referred certain age discrimination cases to DHR for investigation and attempted resolution under the New York Human Rights Law, N.Y. Exec. Law, §§ 290 *et seq.* (McKinney 1982 & Supp. 1990).

[2] The relevant findings by DHR were made following a hearing at which Astoria and Solimino were each represented by legal counsel. Pet. App. A28. DHR's findings are quoted in the district court's opinion:

> The record considered as a whole does not support [Solimino's] allegations that he was denied equal terms, conditions and privileges of employment and terminated because of his age. The record supports [Astoria's] position that [Solimino] was terminated because the position of Vice President which [Solimino] held was eliminated due to the low volume of work performed by [Astoria's] Mortgage Origination Department. There is no evidence in the file that [Solimino's] age was a factor in his termination.

Pet. App. A29.

[3] Under the law then in effect, judicial review of Board decisions was available in the Appellate Division of the New York State Supreme Court. 1984 N.Y. Laws, ch. 83, § 3. In such review, findings of fact by DHR were accorded conclusive effect "if supported by sufficient evidence on the record considered as a whole." *Ibid.* The Board was abolished in 1984, soon after it upheld the DHR ruling at issue here. 1984 N.Y. Laws, ch. 83, § 2. Currently, judicial review of DHR decisions is obtained by initiating a proceeding in the trial-level state Supreme Court for the appropriate county. N.Y. Exec. Law § 298. As before, findings of fact by DHR are conclusive "if supported by sufficient evidence" in the record as a whole. *Ibid.*

2. On February 21, 1985, Solimino filed an action against Astoria in the United States District Court for the Eastern District of New York. He alleged that Astoria, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, had discriminated against him on the basis of age by denying him salary increases and promotions and by terminating him. Pet. App. A15. Astoria moved for summary judgment on the grounds that the action was barred by the statute of limitations and was precluded by DHR's dismissal of respondent's complaint. *Id.* at A4. The district court held that respondent's action was precluded by the DHR ruling and therefore granted summary judgment in favor of Astoria. Pet. App. A14-A29.[4]

In its analysis, the district court noted that two courts of appeals—the Seventh and Eighth Circuits—had addressed the issue whether judicially unreviewed agency factfinding has preclusive effect in actions under the ADEA. Pet. App. A19 (citing *Stillians* v. *Iowa*, 843 F.2d 276 (8th Cir. 1988); *Duggan* v. *Board of Educ.*, 818 F.2d 1291 (7th Cir.

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[4] The court refused to grant summary judgment on statute of limitations grounds. Pet. App. A16-A18. The court determined that there were disputed issues of fact concerning the date on which the cause of action accrued. *Ibid.*

1987)). The court observed that these courts had come to opposite conclusions based on "divergent interpretations of [this Court's] decision in *University of Tennessee* v. *Elliott*, 478 U.S. 788 * * * (1986)." Pet. App. A19. The district court's subsequent analysis largely reflected the approach embraced by the Eighth Circuit in *Stillians*.

The district court understood *Stillians* to "expand[] upon [a] concept, implicit in *Elliott*, of a presumption that existing common-law principles (including rules of preclusion) survive a Congressional enactment except when a contrary Congressional purpose is evident." Pet. App. A21. This presumption, in the court's view, could be overcome only by statutory language or legislative history that (1) "actually addresses" whether facts found by an agency but not reviewed by a court are to have preclusive effect, and (2) "accords them something less than preclusive effect." *Ibid.*[5] Applying this test, the court concluded that judicially unreviewed agency factfinding does have preclusive effect under the ADEA. The court reasoned that the ADEA does not "contain[] any provision * * * like the 'substantial weight' provision of Title VII," *id.* at A27.[6]

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[5] The court deemed irrelevant the provisions in the ADEA that provide for state agency proceedings to be superseded by actions under the statute (29 U.S.C. 633(a)) and that permit concurrent investigations of discrimination claims by state agencies and the EEOC (29 U.S.C. 633(b)). In the court's view, these "statutory deferral mechanisms [were] not an accurate indicator of Congressional intent." Pet. App. A27.

[6] The "substantial weight" provision to which the court referred was added to Title VII in 1972 and requires the EEOC to "accord substantial weight to final findings and orders made by the State or local authorities in proceedings commenced under State or local [employment discrimination] law." 42 U.S.C. 2000e-5(b).

The court further held that DHR's proceedings had preclusive effect in this case and afforded respondent due process because they satisfied the requirements for administrative estoppel: DHR acted in a judicial capacity, gave the parties an adequate opportunity to litigate disputed facts, and made findings of fact that would be accorded preclusive effect in state courts. Pet. App. A28-A29; see notes 2 & 3, *supra*. Finally, the court held, DHR's factual findings precluded respondent from proving a violation of the ADEA. Pet. App. A29.

3. The Second Circuit reversed and remanded. Pet. App. A1-A13. Relying primarily on the Seventh Circuit's analysis in *Duggan*, the court held that judicially unreviewed agency factfinding does not have preclusive effect in an ADEA suit.

Contrary to the district court's approach, the court of appeals framed the issue as one of congressional intent. Pet. App. A6. It rejected the notion that "the absence of the phrase 'substantial weight' from the ADEA disposes of the preclusion issue." *Id.* at A12. The court of appeals acknowledged that, in interpreting Title VII, "the presence of the [substantial weight] provision is dispositive because logically incompatible with preclusion." *Id.* at A12 n.7. But the court reasoned that "other considerations may also justify the conclusion that Congress intended no preclusion." *Ibid.*

One such consideration was the ADEA's deferral mechanism. The court found evidence that Congress contemplated suits following agency decisions against

grievants in Section 14(b), which provides that grievants may not file suit "before the expiration of sixty days after proceedings have been commenced under State law, *unless such proceedings have been earlier terminated.*" Pet. App. A6 (quoting 29 U.S.C. 633 (b)). The court found further evidence that Congress did not intend preclusion in the ADEA provisions that permit state agencies and the EEOC to investigate discrimination complaints concurrently. *Ibid.* (citing 29 U.S.C. 626(d) and 633(b)). "If Congress had intended preclusion from judicially unreviewed state agency findings, 'the concurrent or subsequent EEOC investigation would be superfluous.'" Pet. App. A6-A7 (quoting *Duggan*, 818 F.2d at 1295). Finally, the court determined that preclusion would be inconsistent with the purpose of Section 14(a) of the ADEA, which provides that "upon commencement of action under this chapter such action shall supersede any State action," 29 U.S.C. 633(a). Quoting this Court, the court of appeals observed that "Congress enacted the sixty-day deferral mechanism * * * 'to screen from the federal courts those discrimination complaints that might be settled *to the satisfaction of the grievant* in state proceedings.'" Pet. App. A7 (quoting *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755 (1979) (emphasis supplied by court of appeals)). These provisions, the court concluded, showed that Congress did not intend to bar federal court review of complaints that were not settled to the grievant's satisfaction. Pet. App. A7-A8.[7]

[7] The court noted that its conclusion was supported by the legislative history, which "articulated dissatisfaction with some state remedies to redress age discrimination." Pet. App. A8.

In addition to examining the ADEA, the court of appeals looked to principles enunciated by this Court in construing Title VII, 42 U.S.C. 2000e *et seq.* The court observed that in *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 470 n.7 (1982), this Court indicated "that decisions of the EEOC do not preclude *de novo* fact-finding by a federal court and that Congress could not have intended the federal courts to be bound by the fact-finding of state administrative agencies when they are not bound by findings of the EEOC." Pet. App. A8.[8] The Court in *Kremer* also stated that "unreviewed administrative determinations by state agencies . . . should not preclude [*de novo* federal court] review even if such a decision were to be afforded preclusive effect in a State's own courts." Pet. App. A9 (quoting *Kremer*, 456 U.S. at 470 n.7). These principles, the court of appeals determined, "apply as well to ADEA cases." Pet. App. A9.[9]

The court noted that the EEOC shared its view, and that the EEOC's interpretation was entitled to

[8] The court below quoted the Seventh Circuit for the same proposition. Pet. App. A8-A9 (quoting *Duggan*, 818 F.2d at 1295: "It would . . . be anomalous to conclude that unreviewed state administrative determinations must be given preclusive effect by federal courts when the findings of the EEOC itself do not preclude *de novo* judicial review.").

[9] In the court's view, the differences between the ADEA and Title VII indicate that principles regarding preclusion enunciated in the Title VII context apply *a fortiori* when interpreting the ADEA. Pet. App. A10-A11. The court noted that (1) ADEA grievants are required to wait less time than Title VII grievants between commencing state agency proceedings and filing an action under the federal statute; and (2) under Title VII, state agencies enjoy an initial period of exclusive jurisdiction over discrimination claims that they are not afforded under the ADEA. *Id.* at A11.

deference in light of the agency's responsibility for enforcing the ADEA. Pet. App. A12. Deference was particularly appropriate because the EEOC adopted this interpretation prior to 1986, when Congress amended the ADEA extensively but did not disturb that interpretation. Pet. App. A12, A13 n.9 (citing EEOC Compl. Man. (CCH) ¶ 285, § 5.5(a)(2) (May 1985)).

Based on similar reasoning, the court viewed Congress's failure to add a "substantial weight" provision to the ADEA differently from the district court. Congress added such a provision to Title VII in 1972 because at that time the EEOC accorded no weight to state agency findings. Pet. App. A12-A13 (citing *Kremer*, 456 U.S. at 474-475, 475 n.16). In contrast, when Congress amended the ADEA in 1986, the EEOC already accorded substantial weight to state agency findings in age discrimination cases. Pet. App. A13. Congress's failure to add a "substantial weight" provision to the ADEA was therefore consistent with the view that unreviewed agency findings do not have preclusive effect. *Id.* at A13 n.9.[10]

DISCUSSION

We agree with petitioner that this Court should review the question whether, in a suit under the ADEA, state agency findings of fact that have not

[10] The court also found support for its interpretation in another consistent feature of EEOC practice, namely, the referral of certain age discrimination complaints, including respondent's, to state agencies for investigation. The court considered it unlikely that "a grievant who is obligated to file a complaint with the EEOC * * * and who has no control over the EEOC's decision to refer the case to the state agency should be bound by an adverse, judicially unreviewed [state agency] decision." Pet. App. A10.

been judicially reviewed have preclusive effect. Unlike petitioner, however, we believe that the Second Circuit decided this issue correctly.

1. There is a clear conflict among the courts of appeals as to whether judicially unreviewed administrative factfinding is preclusive under the ADEA. The holdings by both the Second Circuit in this case and the Seventh Circuit in *Duggan* v. *Board of Educ.*, 818 F.2d 1291 (1987), directly conflict with the Eighth Circuit's holding in *Stillians* v. *Iowa*, 843 F.2d 276 (1988). In addition, opinions in the Ninth and the Eleventh Circuits, without addressing the issue squarely, have expressed conflicting views.[11]

As a result of this disagreement, the rights of an ADEA grievant vary according to geography. A grievant in respondent's circumstances whose cause of action arises in the Second or Seventh Circuits has

[11] In *Mack* v. *South Bay Beer Distrib.*, 798 F.2d 1279, 1283 (1986), the Ninth Circuit assumed without discussion that an unreviewed state administrative decision would have preclusive effect in an ADEA suit, but held that the decision at issue there was not preclusive because in the administrative proceedings the "parties did not have an adequate opportunity to litigate [plaintiff's] age discrimination claims." In *Delgado* v. *Lockheed-Georgia, Inc.*, 815 F.2d 641, 646 (1987), the Eleventh Circuit found "persuasive" the argument that unreviewed agency factfinding has no preclusive effect under the ADEA. See also *Corrente* v. *St. Joseph's Hosp. & Health Center*, 730 F. Supp. 493, 499 & n.8 (N.D.N.Y. 1990) (assuming that "unreviewed determinations of state agencies do as a general rule have preclusive effect in subsequent ADEA cases"); *Ibrahim* v. *New York State Dep't of Health*, 692 F. Supp. 1471, 1473-74 (E.D.N.Y. 1988) (relying on *Duggan* to hold that unreviewed agency factfinding does not have preclusive effect under ADEA); *Frank* v. *Capital Cities Communications, Inc.*, 689 F. Supp. 334, 337-338 (S.D.N.Y. 1988) ("assuming (without deciding)" that unreviewed agency factfinding does have preclusive effect under ADEA).

a right of access to the federal courts; a grievant whose cause accrues in the Eighth Circuit does not. A grievant whose cause of action arises elsewhere faces uncertainty over whether the pursuit of an age discrimination claim in a state agency will preclude judicial relief in federal court.

Moreover, uncertainty as to the effect of state agency factfinding hampers the EEOC's ability to enforce the ADEA. The EEOC has negotiated worksharing agreements with 46 state and local agencies that have authority to enforce state and local laws prohibiting age discrimination in employment. Under a typical agreement, certain age discrimination claims are referred to state agencies for processing, effectively giving state or local agencies a period of exclusive jurisdiction of the sort they enjoy under Title VII. See 42 U.S.C. 2000e-5(c). The Commission believes such agreements further Congress's intent to provide States an opportunity promptly to resolve complaints of age discrimination without undue inconvenience or expense to the parties. These agreements also help conserve the EEOC's limited enforcement resources.

The Commission's view as to the desirability of these worksharing agreements, however, has been based on its position that factfinding by state agencies does not preclude either the EEOC or the federal courts from reviewing ADEA claims. As indicated above, it is the EEOC's position that Congress intended such factfinding to be accorded substantial weight, but not preclusive effect. Doubt as to the correctness of this position impedes renegotiation of existing worksharing agreements and the conclusion of such agreements in areas where they are not yet in effect.

2. Although the issue that has divided the circuits merits review, the Second Circuit was correct, in our

view, in holding that judicially unreviewed agency factfinding does not have preclusive effect.

The court of appeals correctly framed the issue as one of congressional intent. This Court took the same approach when it considered the same issue in the context of Title VII and of 42 U.S.C. 1983 in *University of Tennessee* v. *Elliott*, 478 U.S. 788, 796 (1986). There, the Court framed the issue as "whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII [and Section 1983]." *Ibid.*

By the same token, the district court erred when it read *Elliott* "implicit[ly]" to adopt a presumption that administrative preclusion is "appropriate in any federal cause of action." Pet. App. A21. *Elliott* does not assume the existence of any such sweeping rule of administrative preclusion. On the contrary, this Court made clear that a case-by-case inquiry is necessary; it began by observing that the Court had "frequently fashioned federal common-law rules of preclusion," *Elliott*, 478 U.S. at 794, and then considered "whether a rule of preclusion [was] appropriate" for claims under Title VII or Section 1983, *id.* at 795.[12]

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[12] The district court relied (Pet. App. A20-A21) on the passage in *Elliott*, 478 U.S. at 797, in which this Court quoted *Allen* v. *McCurry*, 449 U.S. 90, 97-98 (1980), to the effect that Section 1983 does not "express[] any congressional intent to contravene the common-law rules of preclusion." It is clear from the context of this quotation that the district court's reliance was misplaced. The quotation follows the Court's observation that because *Allen* concerned, not the common law of preclusion, but the statute that requires federal courts to give preclusive effect to state court judgments, 28 U.S.C. 1738, the holding in *Allen* did not address the effect to be accorded unreviewed administrative findings. *Elliott*, 478 U.S. at 796. Addressing that question in *Elliott*, the

With respect to Title VII, the Court in *Elliott* did not end its inquiry upon determining, in light of that statute's "substantial weight" provision, that "it would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal courts." 478 U.S. at 795. The Court also relied on *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), observing that in the latter case the Court "review[ed] in considerable detail the language of Title VII and the history of the 1972 amendments to the statute." *Elliott*, 478 U.S. at 795. The conclusion in *Chandler* —that Congress intended to accord federal employees the same right to a trial *de novo* after adverse agency decisions that non-federal employees enjoy—was applicable to the case before the Court in *Elliott*. It is, we believe, clear from the *Elliott* Court's reference to its prior analysis in *Chandler* that *Elliott* was not based solely on the "substantial weight" provision in Title VII.

Here, the court of appeals was faithful to *Elliott*'s approach when it eschewed exclusive reliance on the absence of a "substantial weight" provision in the ADEA and considered whether "other considerations * * * justif[ied] the conclusion that Congress intended no preclusion." Pet. App. A12 n.7. See also *Duggan*, 818 F.2d at 1297 ("The absence of a com-

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Court looked for evidence that Congress "wished to foreclose the adaptation of traditional principles of preclusion to such subsequent developments as the burgeoning use of administrative adjudication in the 20th century." 478 U.S. at 797. The Court found no evidence to prevent it from "fashioning federal common-law rules of preclusion" (*id.* at 799) for claims under Section 1983.

parable section in the ADEA is certainly not fatal to [the grievant]."). [13]

Like this Court in *Elliott*, the court of appeals examined the text, history, and policies of the statute at issue for evidence of Congress's intent regarding the effect of unreviewed administrative factfinding. Pet. App. A6-A8. The court also considered principles enunciated in decisions of this Court construing Title VII. *Id.* at A8-A9. It was entirely appropriate to take these principles into account, since both the substantive and many of the procedural provisions of the ADEA are derived from Title VII. See *EEOC* v.

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[13] The district court, in contrast, misread *Elliott* when it ended its inquiry upon determining that the ADEA does not "contain[] any provision—like the 'substantial weight' provision of Title VII—which addresses the issue of the proper weight to be afforded state agency findings, and which accords such findings something less than preclusive effect." Pet. App. A27. Beyond that, the district court misinterpreted the significance of the absence of a "substantial weight" provision, as is clear from its belief that, "had Congress wanted to demonstrate an intent to displace common-law rules of preclusion, it could have amended the ADEA to include a provision evidencing that intent, just as it did in 1972 by adding § 2000e-5(b) to Title VII." Pet. App. A27. Congress had no occasion to evidence such an intent when it amended the ADEA in 1986, because the EEOC already accorded substantial weight to unreviewed factfinding by state agencies concerning age discrimination claims. See EEOC Compl. Man. (CCH) ¶ 285, § 5.5(a)(2) (May 1985). Congress's failure to alter the EEOC's practice when amending the ADEA in other significant respects suggests, if anything, acquiescence in this practice. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Under these circumstances, the court of appeals was clearly correct to accord deference to the EEOC's interpretation of the ADEA. Pet. App. A12 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

Commercial Office Prods. Co., 486 U.S. 107, 123 (1988); *Oscar Mayer*, 441 U.S. at 755; *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985); *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978); see also *Yellow Freight Sys., Inc.* v. *Donnelly*, 110 S. Ct. 1566, 1570 (1990).

The court of appeals also properly found support for its interpretation in the deferral provisions of the ADEA. See Pet. App. A6-A7. As the court recognized (*id.* at A7), the purpose of the ADEA's limited referral of age discrimination claims to state and local agencies is to provide for prompt and convenient settlement of complaints "to the satisfaction of the grievant." *Ibid.* (quoting *Oscar Mayer*, 441 U.S. at 756). According agency proceedings preclusive effect would be inconsistent with this purpose, for it would foreclose judicial review of claims that were *not* settled to the grievant's satisfaction in state proceedings. As the Seventh Circuit stated, "[g]iven the multiple forums provided for in Title VII and the ADEA and the place of the state agency and EEOC in the process as informal agents of reconciliation, it is unlikely that Congress intended the process to effectively stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." *Duggan*, 818 F.2d at 1295.[14]

[14] The district court believed that, if respondent had brought his age discrimination action in state court, DHR's judicially unreviewed ruling would have been accorded preclusive effect. Pet. App. A28-A29 (citing *Kirkland* v. *City of Peekskill*, 828 F.2d 104, 107 (2d Cir. 1987)). See also 29 U.S.C. 626(c)(1) (authorizing ADEA grievants to bring action "in any court of competent jurisdiction"). Assuming this is so, that does not resolve the question whether Congress intended federal courts to accord such findings the same effect. As this Court observed in *Kremer* with respect to Title VII,

To be sure, this understanding of the ADEA's deferral mechanism imputes to Congress an intent to favor unsatisfied grievants over employers who have successfully defended against charges of age discrimination before the state agency. This result, obviously, has the potential to spawn duplicative litigation in federal court after completion of what may well have been thorough and comprehensive state administrative proceedings—a potential that follows from any decision denying preclusion. Whatever the wisdom of such a regime, that this was nonetheless Congress's intent is strongly suggested by the supersedure provision in Section 14 of the ADEA, 29 U.S.C. 633. Section 14 clearly entitles grievants to supersede ongoing agency proceedings by filing suit 60 days after the proceedings begin. 29 U.S.C. 633. Since Section 14 also permits grievants to file suit sooner if agency proceedings are "earlier terminated," 29 U.S.C. 633(b), it appears to contemplate suits by grievants for whom agency proceedings terminated adversely. If the grievant won the earlier terminated proceeding, then he obviously would have no reason to go to federal court. Yet petitioner's position is that if the grievant lost, he could not.

"Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review *even if such a decision were to be afforded preclusive effect in a State's own courts.*" 456 U.S. at 470 n.7 (emphasis added). See also 5 U.S.C. 7703(c) (giving federal employees who litigate age discrimination claims before the EEOC and the Merit Systems Protection Board the right to trial *de novo* in actions under ADEA); *Rosenfeld* v. *Department of the Army*, 769 F.2d 237 (4th Cir. 1985) (determination by Civil Service Commission did not preclude ADEA suit).

In any event, by giving grievants the right to opt out of agency proceedings that last longer than 60 days, Congress clearly expressed an intent to give ADEA grievants, rather than their employers, the right to have their claims decided in a federal court. It is unlikely that Congress intended to deny this right to grievants whose agency proceedings concluded sooner, albeit unfavorably.

Contrary to the Eighth Circuit's view, a holding denying preclusive effect does not reduce agency proceedings to merely "an opportunity for the [grievant] to test his case." *Stillians*, 843 F.2d at 282. "Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a * * * trial *de novo*. See Fed. Rule Evid. 803(8)(C). * * * Moreover, it can be expected that, in light of the prior administrative proceedings, many potential issues can be eliminated by stipulation * * *." *Chandler*, 425 U.S. at 863 n.39. In addition, grievants who lose in the state agency—even if not pleased—may accept the outcome and forego the time and expense of further litigation. Such decisions may well turn on the quality of the administrative proceedings.[15] Under the court of appeals' holding, States retain an incentive to afford grievants an adequate opportunity to assert their age discrimination claims, and grievants retain an incentive to avail themselves of this opportunity.[16] In any

[15] The court of appeals did not reach the issue whether DHR's proceedings satisfied the requirements for administrative preclusion and provided respondent due process. See *Elliott*, 478 U.S. at 797-798. In accordance with *Elliott*, this issue should be left for remand if the court of appeals' decision is reversed. *Id.* at 799 n.8.

[16] A contrary holding would give grievants who are in doubt as to the adequacy of administrative proceedings a powerful incentive to file ADEA actions on the sixtieth day after commencement of the proceedings. See 29 U.S.C. 633(b). This would frustrate Congress's intent to encourage full use of state remedies to resolve age discrimination claims. See *Oscar Mayer*, 441 U.S. at 756.

event, such considerations go to the wisdom of not according unreviewed agency findings preclusive effect, a policy choice that is entrusted to Congress. For the reasons set forth above, we think it clear that Congress has decided that such findings should not enjoy preclusive effect in ADEA suits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DONALD R. LIVINGSTON
Acting General Counsel

STUART M. GERSON
Assistant Attorney General

GWENDOLYN YOUNG REAMS
Associate General Counsel

JOHN G. ROBERTS, JR.
Deputy Solicitor General

VINCENT J. BLACKWOOD
Assistant General Counsel

RICHARD H. SEAMON
Assistant to the Solicitor General

LAMONT N. WHITE
Attorney
Equal Employment Opportunity Commission

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